

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, PRETORIA**

**CASE NO: 2679/2016**

In the matter between:

22/12/2016

**GEZANI ISAAC MASINGI**

**Applicant**

and

**GREATER GIYANI MUNICIPALITY**

**Respondent**

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**J U D G M E N T**

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**SIWENDU, AJ:**

**INTRODUCTION**

- [1] This application was launched in terms of Section 11 of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). The applicant seeks an order compelling the respondent to provide it with the results of the interviews held in February 2015 in respect of the position of Municipal Manager. He further seeks a disclosure of the results of scores or aggregate scores of all candidates interviewed, including the recommendations made to the

respondent following these interviews. In addition to the information above, the applicant requires that reasons, why he was "not appointable" following the interviews, are furnished to him.

[2] The facts leading to the application are in brief that, in September 2014, the applicant had applied for and was invited to attend an interview with the respondent for the position of Municipal Manager with the respondent. The position was not filled but instead, it had been re-advertised. The applicant was once more invited to attend a second interview which took place on 19 February 2015. He was referred for assessment. For the purpose of this judgment, I have taken the view that the assessment was of psychometric and competency base in nature, prescribed by The Municipal Regulations on Minimum Competency Levels, 2007, issued in terms of Local Government: Municipal Finance Management Act 2003. The regulations provide that every accounting officer of a municipality and municipal entity must meet the minimum competency requirements in four prescribed categories. A selection panel must also recommend the second (2<sup>nd</sup>) and third (3<sup>rd</sup>), suitable candidates. The selection panel must submit a report and recommendation to the municipal council. Recommended candidates must undergo competency assessment in prescribed areas.

[3] In September 2015, the applicant requested the respondent to provide him with the outcome of the interview together with the results of the interview and competency assessment. A reply by and under the hand of the Mayor of the respondent to the applicant dated 25 September 2015 states:

***"this communique serves to inform you that your application for the***

***post mentioned above was unsuccessful."***

- [4] The applicant contends that the letter was not satisfactory, deprives him of his constitutional right to know how the respondent made certain administrative decisions. In particular, he states that he is entitled to know if the procedure and process followed was correct, fair and lawful. A letter by his attorneys requesting this information dated 9 October 2015 dispatched in terms of Section 18 the Act did not yield results.
- [5] The applicant submits that the respondent has not designated an Information Officer. The prescribed period of 30 days within which to provide the information prescribed in PAIA has lapsed. Since the respondent failed to provide the information within the prescribed period of 30 days, has not exercised the right to seek clarity on the information required and has failed to seek an extension of time as it is entitled to in terms of the Act, it has launched this application. He claims that he is prejudiced by the silence but also acknowledges that he has no birth-right to appointment
- [6] The respondent opposed the application in an affidavit deposed to by its Acting Municipal Manager. In the first instance, it raises a point *in limine* that the applicant has failed to comply with Sections 74, 75 and 78 of the Promotion of Access to Information Act in that he should have directed his letter to the Human Resources Department. The respondent persisted with this view on the basis that to do so would have been compliance with practice. He also in line with the papers contended that the applicant should have lodged an appeal against the decision to refuse access or taken in terms of Sections 22, 26(1) or 29(3). The essence of this argument is that

the applicant failed to exhaust his internal remedies envisaged in Section 74. In this regard the respondent submits that Section 78(1) bars the applicant from commencing proceedings against the respondent, as the application is premature, it must be dismissed with costs.

[7] In argument, the respondent also took issue with the request of the information because the applicant had already confirmed that it had received the information required from another source. It submits it complied with the applicant's letter dated 16 September 2015. The respondent provided the applicant with the written results (meaning the outcome). It submitted that the response was adequate as the outcome of the interview was provided.

[8] The argument by the respondent was, with good reason rebuffed by the applicant. It is evident from the letter dated 16 September that the applicant was provided with the outcome of the interview process but not with the information requested. Section 25(1) of PAIA offers the respondent an opportunity to decide whether to grant the request for information and notify the applicant of its decision within 30 days of the request. Furthermore, section 27 provides for a deemed refusal where the information sought is not provided within the prescribed period. The provisions of PAIA are to be read to provide an applicant confronted with such a failure the right to take the next procedural step in a matter. I am satisfied that there was a deemed failure to provide the information as provided in PAIA

[9] The issue to be determined is whether the applicant has the right to and ought to be granted access to the information claimed.

[10] Before dealing with the matter, it is necessary to mention that the court

requested the parties to file supplementary heads within five (5) days of the hearing of the application. The aim was to afford parties the opportunity to address the question whether the applicant was entitled to information relating to third parties and whether the provision of such information may breach the Protection of Personal Information Act 4 of 2013 ("POPI"). The applicant availed himself of the request and filed its supplementary heads on 21 September 2016, but the respondent has failed to do so.

- [11] Given the constitutional questions underlying the right of access to information, the differing approaches by the courts, the evolving nature of the rights at issue due to legislative reform, as well as the potential for competing rights involved in this case, I would have benefitted from greater assistance from both counsel
- [12] PAIA is the national legislation contemplated in section 32(2) of the Constitution. By the obligation imposed by this provision, PAIA was enacted to give effect to the right of access to information, regardless of whether that information is in the hands of a public body or a private person. The purpose of PAIA is to engender the principle of transparency and accountable governance. PAIA arms a party who seeks information necessary for the exercise or protection of a right to call for the provision of such information. Section 11(1) obliges a public body which must be interpreted to include the respondent. [a sphere of government] to grant access to the record sought. Given that the underlying premise is the exercise of or protection of a right, drawing from cases adjudicated in terms of Rule 53 of the Uniform Rules of Court is of assistance.

[13] In the current case, the applicant has framed his case as that of a disclosure of information relating to the full results of interviews including scores or aggregate scoring obtained by the various candidates, the recommendations made by the selection panel to the municipal council, including reasons for his not being appointed.

[14] In the *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 45, the court draws a distinction between the disclosure of reasons for a decision to select some candidates over others on the one hand and the disclosure of deliberations and votes of individual parties. In *The Helen Suzman Foundation v Judicial Services Commission and others* (2014) ZAWCHC 136, referring to the judgment in *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA); quoting Baxter, "Administrative Law (1989) at 228, Le Grange J confirms that provision of information may not only help distil reasons for a decision where this has been made but:

*" helps structure the exercise of the discretion -Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review*

[15] There can be no doubt in my view that for decades, the right to be provided with reasons for decisions made in the exercise of a public function or power has been an integral part of our administrative law system subsequently entrenched by the Constitution. The applicant is entitled to the reasons

sought, namely why he was not appointed or appointable as he has framed it. There is no justification for withholding these from him. This, however, does not dispose of the matter as in the current case. I am also required to determine the ambit or extent of transparency in respect of the information sought. This aspect relates to the recommendations made by the selection panel to the council and the aggregate scores or scores of the various candidates.

- [16] The principle of justification requires that a court must consider the rationale for the information and the connection to the constitutional function and right to be protected. There is a rational connection between the recommendations made, the reasons offered and whether a fair process and rational decisions reached. Providing the recommendations made to the council serves a variety of reasons. The first is to determine whether the applicant's name was amongst those recommended, the second is to enable him to gauge his relative position compared to those recommended, the third is to evaluate whether the reasons for his non-appointment may be congruent with the reasons provided about the recommended candidates. It is essential to observe that the applicant's papers state that he is aware that an appointment is not a birthright. I understood this to mean an acknowledgment that the respondent has discretion on whom to appoint to the position provided it made it rationally. There can be no justifiable reason for withholding the recommendations made to the council from the applicant.
- [17] The last aspect relates to the provision of interview results and the scores or aggregates of all candidates. An assessment of the information sought must

be made. The *Helen Suzman Foundation* decision above highlights various cases reflecting differing approaches by the courts in the past as to the documents subject to disclosure, for example, in the *Johannesburg City Council v The Administrator, Transvaal and Another* (1) 1970 (2) SA 89 (T) at 91H-92A; *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (T) and *Comair Limited v The Minister of Public Enterprises and Others* NGHC Case No: 13034/13 and *In MEC for Roads and Public Works and in so far as PAIA, the Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA). The Supreme Court of Appeal *Eastern Cape and Another v Intertrade* endorsed the principle that some documents on the grounds of privilege or relevance may not be subject to disclosure.

[18] I discerned from the *Eastern Cape and Another v Intertrade* decision that the right to information is not an unlimited one and must be balanced with other rights, for example, the right to dignity and privacy. In this regard, there may be instances where a limitation of the right to access information may be reasonable and justifiable. The principles that have evolved are that disclosure and access must be weighed against; the nature of the proceedings, the level of candour required in the deliberations; the effect of the level of transparency in discouraging applicants; as well as potential impingement on the dignity and privacy of the applicants who applied with the expectation of confidentiality.

[19] In so far as the applicant relies on PAIA, the rights are fettered by Chapter 4, Section 34 which provides for mandatory protection of privacy of the third party who is natural person states that

*(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.*

[20] Information can be denied if the disclosure would involve unreasonable disclosure of personal information about a third party. The refusal to provide information may also be justified in terms of Section 81(3) of PAIA. Reference can also be sought at the decision in the *Centre for Social Accountability v Secretary of Parliament and Others* [2011] 4 ALL SA 18 (ECG).

[21] Information which may be refused with regards to personal information means information relating to medical history or personal opinions. In my view, the ambit of medical information is wide enough to include psychometric assessment scores if this was a component of the competency assessment. The information relates to the protected inner aspects of personality affecting one's privacy. In my view, protection is not lost by virtue of having applied for a post in a public sector setting. The disclosure of such information would not be unhelpful as it may not only lead to disputes about the validity or reliability of the testing but may be intrusive on the rights of the other candidates. The reach of the application is wide enough to include private medical information. The applicant is not entitled to competency based assessment scores and results of other candidates other than his own.

[22] The respondent has simply provided the outcome of the interview process but not the information sought. It had an election to either refuse the request

or defer the same as provided by Section 24 rather than what in essence, is partial compliance with the request on its part. Equally, Section 28 of PAIA provides the respondent the right to severe of information in certain instances. The respondent does not contend that the refusal of the information is justified. In this regard, the provision of the first, second and third candidate recommended forms part of the regulated procedure. There is no justification for withholding this information from the applicant as part of the recommendations made to the council.

[23] What remains is the question of costs. The applicant has been successful in the application. It follows that the costs must follow the results. In the circumstances:

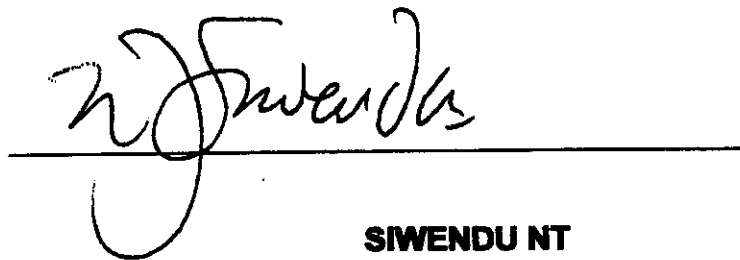
[24] I make the following order:

[24.1] The respondent must provide the applicant with reasons for not appointing him to the post;

[24.2] The respondent must provide the applicant the recommendations made to the Council as well as the recommended first, second and third candidates; and

[24.3] The respondent must provide the applicant with his personal competency assessment scores

[24.4] The respondent is ordered to pay the costs of the application



**SIWENDU NT**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, PRETORIA**

CASE NO.

:2679/16

HEARD ON

:12 September 2016

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DATE OF JUDGMENT

:22 December 2016